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Nos. 82-1913 and 82-1951

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

JOE G. GARCIA, APPELLANT
v.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT
v.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

On Appeals From the United States District Court for the Western District of Texas

BRIEF OF AMICI CURIAE California, Connecticut, Hawaii Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming

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INTEREST OF THE AMICI CURIAE

The states identified above submit this brief *amici curiae* to address the Court's question "[w]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered." The states endorse the principles of federalism enunciated in *National League of Cities*, and suggest here the contours of a revised analysis of state immunity which would ease judicial application of those principles, yet preserve the separate and independent role of the states.

The interests of the *amici* relevant to the question posed by the Court include, of course, the preservation of the states' autonomy and their identities as independent repositories

of sovereign authority within our federal system. The states also hold a correlative interest in preserving the constitutionally mandated balance between the powers of the federal government and those of the states. The continued harmony of those powers ensures the preservation of the republican democracy envisioned by the Framers. Retreat from the principles articulated in National League of Cities would free the central government from the restraints wisely fashioned by the Framers to preserve liberty and to nurture the democratic spirit. As sovereigns performing a broad range of functions to promote the welfare of persons within their borders, the states are uniquely qualified to suggest clarifications of the principles of National League of Cities which might

ease judicial application while maintaining the object of its holding.

SUMMARY OF ARGUMENT

The debates on the framing of our Constitution and two hundred years of experience testify to the integral role of vital, autonomous states in the plan of our government. As checks on the concentration of all power in the national government, and as instruments of self-government through which the people may address their intimate daily concerns, the states are among the chief means by which the framers hoped to "secure the blessings of liberty." The decisions of this Court have repeatedly acknowledged the critical role of the states in the federal system.

In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court

reaffirmed these tenets and the principle, recognized in other contexts, that the sovereignty of the states constitutes a fundamental limitation on the powers delegated to Congress. There is no escape from this conclusion, unless it lies in abdication of the judicial role in interpreting and upholding the principles of federalism and separation of powers, which are embodied in the Constitution.

The cases following National League of Cities have drawn from that case a three-pronged test for determining when Congress has unconstitutionally infringed state sovereignty. In that this test appears to embody a categorical approach to the question, deciding cases by determining whether a function undertaken by the states is or is not a sovereign function, the amici states submit that it fails to respect the democratic choices

of the people acting through their state governments, and fails to reflect the fluidity and dynamism of the constitutional scheme. There are few limits in the Constitution on the field within which the states may act, and the adjustment of conficts between national and state interests should not be accomplished by limiting states, but not the federal government, to the area occupied in the eighteenth century.

The Court should therefore recognize that when congressional actions under the Commerce Clause are challenged as intruding upon state sovereignty, it is called upon to balance the strength of the federal interest in regulating the states as states against the seriousness of the intrusion upon state sovereignty.

If there is inconsistency or confusion in the test previously applied by the Court, it may arise from the difficulty of defining the "rights" of states viewed as mere corporate entities. The states therefore submit that an alleged infringement of their sovereignty should be assessed in light of their role, as instruments of self-government, in the constitutional scheme. The constitutionally relevant injury is not the displacement of the substance of a local choice, but of the choice itself, or of the political processes through which the choice is made and expressed. Although the test currently applied by this Court should be replaced by a balancing of interests, the elements of the current test are nonetheless helpful in striking the balance.

Finally, the amici states argue that the case before the Court should not be decided by reference to the history of state or federal activities, since history reflects only the needs of a simpler time. Rather, the Court should consider the predominantly local nature of public mass transit, the choice of the people to secure the service through their local governments, and the congressional endorsement of that choice. The states submit that the balance in this case tips against the extension of the FLSA to public mass transit employees.

ARGUMENT

I. THE DECISION IN NATIONAL LEAGUE OF CITIES ACCURATELY REFLECTS THE PRINCIPLES OF OUR FEDERAL CONSTITUTIONAL STRUCTURE.

Two centuries of constitutional litigation and debate leave no doubt that

the political autonomy of the states necessarily limits the otherwise permissible activities of the national government. The longstanding controversy over principles of intergovernmental immunity concerns not the existence of the limitation, but only the proper line of its demarcation. The debate is renewed with the suggested reconsideration of National League of Cities, 426 U.S. 833 (1976), a decision which reaffirmed state sovereignty as a limitation on the federal commerce power. Although further clarification and elaboration of the analysis is appropriate, its wholesale displacement is not; the structure of our federal system, the constitutional text, and intervening judicial decisions attest to the "separate and independent existence" of the states and to the endurance and significance of the immunity protecting

their core operations from congressional intrusion under the banner of commerce regulation. See National League of Cities, 426 U.S. at 851.

1. While the text of the Constitution provides few, albeit significant, indicia of the states' autonomy,[1/] their continued sovereignty is, nonetheless, an essential feature of the Framers' federal system. The Constitution assumes the existence of the states,

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1/ For example, Article I, § 8, cl. 16, reserves "to the States respectively" the power to appoint the officers of any militia for which Congress might provide. Article I, § 9, cl. 5, denies Congress the power to lay any tax or duty "on Articles exported from any State." Article I, § 9, cl. 6, prohibits Congress from discriminating among state ports in its regulation of commerce or revenue. Article IV, § 3, denies Congress the power to divide or join states without their consent. Article V, governing the amendment process, provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

and focuses chiefly on the scope of national powers. The Framers viewed the structure of the new government -- the separation of powers among the branches and between the national and state governments -- as the primary security for "the blessings of liberty" won in the War of Independence.[2] In response to the opponents of the proposed constitution, who feared the concentration of power in a national government and the destruction of state sovereignty,[3]

2/ "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." The Federalist No. 51, at 323 (J. Madison) (Mentor ed. 1961). (All citations to The Federalist papers in this brief are to the 1961 Mentor edition.)

3/ See J. Main, The Anti-Federalists, Critics of the Constitution 120 (1961).

the Federalists relied upon the state governments, as alternative sources of authority and objects of loyalty, to curb any tendency of the national government toward unresponsiveness, excessive centralization and tyranny. The Federalist No. 17 at 119, (A. Hamilton), No. 46 at 298 (J. Madison). The efficiency and accountability of the state governments made them an effective "counterpoise" to the threat of overreaching national authority. Id. The sovereign authority of the states is guaranteed by the constitutional structure, and functions as a limit upon congressional action which threatens that independent status.

The structural assumption of state autonomy is not to be found exclusively in the Tenth Amendment. Its literal terms indeed state a "truism," United States v. Darby, 312 U.S. 100, 124

(1941), or "may be deemed unnecessary," 1 Annals of Cong. 441 (1789), but they nevertheless reflect an underlying constitutional limitation on the national government. They echo the common understanding that the Constitution establishes a national government of only limited powers, leaving to the states the residuum of sovereign authority. See The Federalist No. 9 at 76 (A. Hamilton); J. Main, The Anti-Federalists, supra at 155. The Tenth Amendment thus manifests "the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n. 7 (1975).

These structural protections are not infallible, as the Framers knew. For

the powers reposed in the central government to be effectively cabined, the states themselves must remain strong both to serve as effective critics of the central government and to nurture the democratic spirit. To remain strong, the states must retain the confidence and affection of their citizens. This they cannot do except as they remain accountable, effective instruments of self-government.

The federal structure nurtures the democratic spirit by leaving control of local matters to governments more accessible to the people and more responsive to local conditions.[4/] The value of the states in this scheme does not lie,

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4/ See The Federalist No. 17 at 119-20 (A. Hamilton), No. 45 at 292-93 (J. Madison).

as some suppose, in an assumed individual right to particular governmental services,[5/] or even in the greater merit of local decisions, but in the states' role as instruments of self-government. Still, because there can be greater participation in state government and because the states are closer to local concerns, the states may serve, and often have served in our nation's history, as laboratories for experimentation and development of social and economic ideas. See Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis,

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5/ See Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065 (1977); Michelman, States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery, 86 Yale L. J. 1165 (1977).

J., dissenting). Only last term this Court saw dramatic evidence of that truth. See Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2431 (1984). The challenge of individual state experimentation, both the successes and the failures, keeps the nation supple as it feeds the confidence of the people in democratic government.

2. The Court has long recognized the intergovernmental immunities, both explicit and implicit in the Constitution, which protect the essentials of state sovereignty. For example, the implied restrictions on the national taxing power were first articulated in Collector v. Day, 78 U.S. (11 Wall.) 122 (1871), holding the salary of a state judge immune from taxation. This immunity was derived solely from the states'

autonomy in the constitutional scheme, which presupposes and guarantees the continued existence of the states as governmental bodies performing traditional sovereign functions. See Massachusetts v. United States, 435 U.S. 444, 454 (1977) (opinion of Brennan, J.). The extension of the states' tax immunity to state officers was eventually abandoned, see Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); Helvering v. Gerhardt, 304 U.S. 405 (1938); but the fundamental principle -- the states' implied constitutional immunity from federal taxation -- endures to protect the states from undue interference in the performance of the sovereign functions of government. New York v. United States, 326 U.S. 572, 587 (1946) (Stone, C.J., concurring).

A similar acknowledgement of the states' autonomous, sovereign existence is evident in the limitations on the reach of the judicial power of the national government. By its terms, the Eleventh Amendment forecloses federal jurisdiction in suits against a state by the citizens of another, yet the Court properly saw in it a more general principle which precludes suits against the state by its own citizens as well. Hans v. Louisiana, 132 U.S. 1, 15 (1890). The Eleventh Amendment is "but an exemplification" of the more basic principle of the sovereign immunity of the states as a constitutional limitation on the federal judicial power. Ex parte New York, 256 U.S. 490, 497 (1921); see also Pennhurst State School and Hospital v.

Halderman, 104 S.Ct. 900, 907 (1984).[6/]

Similar judicial recognition of the significance of the unimpaired sovereignty of the states in this federal system is also apparent in such decisions as Coyle v. Smith, 221 U.S. 559 (1911), and Lane County v. Oregon, 74 U.S.(7 Wall.) 71 (1869). Thus, the essential feature of the federal constitutional structure -- the continued independent sovereignty of the states -- fixes the principle of intergovernmental immunity that affirmatively limits the reach of the national authority.

6/ The principles of federalism derived from the constitutional structure serve also to limit otherwise appropriate federal jurisdiction in order to preserve the legitimate and separate functions of the states and their institutions. See, e.g., Younger v. Harris, 401 U.S. 37, 44-45 (1971); Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800 (1976).

3. It is against this backdrop that the correctness and vitality of National League of Cities must be assessed. There the Court held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which extended the federal minimum wage and maximum hour provisions to state and local employees. Although within the scope of the Commerce Clause, the wage and hour regulations displaced "the States' freedom to structure integral operations in areas of traditional governmental functions," id. at 852, and thus exceeded the reach of congressional authority. In contrast to the permissible regulation of private individuals, who are necessarily subject to the dual sovereignty of federal and state governments, the FLSA was directed against the "States as States" and infringed upon

"attributes of sovereignty" which may not be impaired by Congress. Id. at 845.

In reaching this conclusion, the Court did not rely exclusively on the Tenth Amendment as the source of this affirmative limitation on the commerce power. Rather, the principle of intergovernmental immunity derives from the constitutional structure, which implicitly and explicitly recognizes "the essential role of the States in our federal system of government." Id. at 844. The Tenth Amendment merely exemplifies the structural barriers to federal intrusion upon state sovereignty.

As National League of Cities acknowledges, the states are not just corporate bodies, like any other, but are instruments of self-government constitutionally immune from congressional impairment or subversion. From this perspective, the

application of the FLSA to the states was unconstitutional as an interposition of foreign regulation between the citizens and their governments. Insofar as it was intended to override contrary state law without regard to the functions served by the covered employees, the FLSA dramatically limited local democratic choice and impaired the ability of the people to govern themselves.[7/] The disruption of state sovereignty wrought by the FLSA extension lay not only in

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7/ The dissent in National League of Cities suggested that the FLSA was likely to have little practical effect on state choices. 426 U.S. at 873-75 n. 12. If so, this simply means that the interposition of federally created employee rights was gratuitous. The lesson for the citizens of the States was nevertheless that their governments were not their own.

Furthermore, in assessing National League of Cities, one cannot ignore the

(footnote continued)

the economic consequences, but in the diminution of the states' authority to debate and decide the terms and conditions under which important state services are provided and the consequent erosion of popular confidence in and allegiance to state government.

It seems proper to add at this point that the alternative to the course chosen in National League of Cities -- return to the reasoning of Maryland v. Wirtz,

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(footnote continued)

implications of a decision upholding application of FLSA to state employees. The theory upon which the act was passed was the same used to support enactment of more thorough regulation of employer-employee relations. See Maryland v. Wirtz, 392 U.S. 183, 191-92, 194-95 (1968). Absent a ground for distinguishing the FLSA from any other regulation of public employment, and Wirtz promised no such limitation, a decision upholding the statute would be tantamount to a decision that Congress could nationalize all aspects of the relation between a state and its employees.

392 U.S. 183 (1968) -- is clearly unacceptable. It is instructive to recall that in Wirtz the Court held that state concerns, however characterized, may never "constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." 392 U.S. at 195. Although the Court was confident that it has "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity,'" id. at 196, the only power identified was the Court's authority to determine the scope of the Commerce Clause itself. Yet continued state autonomy cannot confidently be made to depend on the Court's authority to identify intrinsic limits on the commerce power. Compare id. at 196-97 n. 27, with L. Tribe, American Constitutional Law 242 ("contemporary Commerce Clause doc-

trine grants Congress such broad powers that judicial review of the affirmative authorization for congressional action is largely a formality"). Congress has used its power under the Commerce Clause to destroy; and so used, the power has been strongly defended. See Hammer v. Dagenhart, 247 U.S. 251, 277-81 (1918) (Holmes, J., dissenting).[8/]

8/ The conclusion in Wirtz, that under the Commerce Clause there is no basis for distinguishing between sovereign states and private businesses, in itself demonstrates the futility of reliance upon intrinsic limits on that power. Of course there are distinctions, and they are constitutionally based. For one thing, the states, but not private businesses, possess governmental powers. For another, as even Wirtz acknowledges, the continued existence and vitality of the states, but not private enterprises, is an assumption underlying the constitutional structure. The conclusion that those differences are not significant under the Commerce Clause belies any hope that intrinsic limits in that provision

(footnote continued)

If we accept the assurance in Wirtz that the Court has "ample power" to preserve the states, but at the same time recognize that review of congressional power under the Commerce Clause is limited, we must then conclude, despite the opinion, that there are constitutional commands extrinsic to the provision that limit Congress's power to intrude upon state sovereignty. Consequently, the Court's decision in National League of Cities, however imperfect, is preferable to the contradiction and obscurity of Wirtz. The conclusion of National League of Cities was therefore correct: considerations of state sovereignty, not just the Tenth Amendment, necessarily limit

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(footnote continued)

will sufficiently preserve the states' sovereignty.

the reach of congressional commerce authority in matters affecting the integral operations of the states.

Following National League of Cities there emerged the now familiar three-pronged test for assessing the constitutionality of commerce power legislation: (1) the challenged statute must regulate the states as states; (2) the federal regulation must address matters that are indisputably attributes of state sovereignty; and (3) the states' compliance must directly impair their ability to structure integral operations in areas of traditional governmental functions. In addition, despite satisfaction of these criteria, the federal interest advanced may be so strong as to justify state submission. Hodel v. Virginia Surface Mining & Reclamation Association,

452 U.S. 264, 287-88 and n. 29 (1981). This "test", however, reflects only some features of the appropriate constitutional analysis and is not well-suited to measuring federal intrusions upon the states' sovereignty. The amici states present below an analytical framework which incorporates the test in a balancing process and which, they believe, more faithfully preserves the principles and values of federalism.

II. THE APPROPRIATE FEDERALISM ANALYSIS ENTAILS THE BALANCING OF COMPETING INTERESTS.

A. Judicial Review Is Required.

With few exceptions, the reasoning in National League of Cities, if not always the result, has been criticized

by commentators.[9/] Even conceding that there are limits beyond which the commerce power may not extend, many commentators are prepared to have the Court abandon the effort to articulate those limits simply because coherent principles of decision have not been identified. See, e.g., Alfange, supra at 237-46. The critics attempt to rationalize the abandonment of judicial review by arguing that Congress will not transgress against the states because the interests of the states are represented or are otherwise adequately protected. See Alfange supra at 242-45 (and sources cited); Brief

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9/ See, e.g., Alfange, Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming, 1983 S. Ct. Rev. 215 (1983). But cf. Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81 (1981).

of Appellant Joe G. Garcia on Reargument at 30.

This Court has not endorsed the view that judicial review of the great constitutional questions is unavailable to those who may be thought sufficiently represented in the political process. See National League of Cities, 426 U.S. at 841 n. 12. See also INS v. Chadha, 103 S.Ct. 2765, 2779-80 (1983); Massachusetts v. United States, 435 U.S. 444 (1978).10/ No party has argued or could argue that this case falls within the political question doctrine, the only available theory for denying judicial review. See INS v. Chadha, supra; Baker v. Carr, 369 U.S. 186, 313 (1962).

10/ Indeed, the Court has gone further than it is asked to go here, in resolving the intramural disputes of the other branches. See United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969).

Despite the criticism of the Court's intergovernmental immunity decisions on the ground of inconsistency, few suggest that judicially manageable standards simply cannot be found. Inconsistency of past decisions, if such there is, has never been considered a basis for ruling a question beyond judicial competence;[11/] it is, rather, a ground for renewed effort. See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The plurality opinion in Northern Pipeline explains why this case is particularly appropriate for judicial decision: "The Federal judiciary was . . . designed by

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11/ Indeed, complete consistency of decisions might suggest that the law has ceased to grow and adapt. See O.W. Holmes, Codes and the Arrangement of the Law, 5 Am.L.Rev. 1, 1 (1870).

the Framers to stand independent of the Executive and Legislature -- to maintain the checks and balances of the constitutional structure. . . ." Id. at 57-58. As we have shown, the federal system too was conceived in part as a check on governmental excesses, and for that reason commands judicial protection as much as those provisions conventionally referred to as separation of powers provisions.

The Secretary relies on the theory of state representation in Congress, not to argue that the question is inappropriate for judicial resolution, but to suggest that substantial deference is due federal enactments which are alleged to infringe state sovereignty, particularly where Congress is shown to have considered the states' interests. Supplemental Brief for the Secretary of

Labor at 15-16. It is true that regional interests are represented in Congress; and to the extent that the Secretary's argument refers to federal constriction of state regulatory power under the Commerce Clause, we agree that deference is owing to congressional judgment.

It is a very different matter, however, to claim deference to a supposed congressional judgment that a federal enactment does not intrude unduly upon the integral operations of the states.[12/] Since the states are not represented as such in Congress, there is no assurance that their interests are adequately represented, just as the fact

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12/ See Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (states are not merely another shifting economic political factor to be considered by Congress).

that legislators are individuals does not guarantee that individual rights will receive adequate consideration in the legislative process.[13/] More likely, if the interests of states as such are raised at all, they will be invoked to serve other political interests. See L. Tribe, American Constitutional Law 242 (1978). It implies no disrespect or distrust of Congress to say that its judgment on the issue of state autonomy is entitled to no more deference than would be shown in a case alleging that Congress had invaded the executive prerogative or the rights of individuals. What this Court said in Chadha is equally appli-

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13/ Congress may, in fact, be less likely now than formerly to respect the claims of states as states. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 848, 860-83 (1979).

cable here: "The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 103 S.Ct. at 2784.

B. A Balancing Test Is Appropriate.

The danger to be resisted in cases such as this is not that Congress will destroy the states in a single action, Fry v. United States, 421 U.S. at 547 n. 7, but that its incremental actions, will "leave the states intact but functionally a gutted shell." L. Tribe, American Constitution Law 310. The central difficulty is that the Constitution distributes governmental authority among several centers without defining exhaustively the jurisdiction of each. Just

as the powers distributed among the branches of the federal government are not "hermetically sealed from one another," INS v. Chadha, 103 S.Ct. at 2784, so the powers delegated to the federal government and those reserved to the states are not mutually exclusive. It follows that the search for mechanical or mathematical rules of division between the centers of governmental authority is not only fruitless, but in fact inconsistent with the fluid, dynamic system envisioned by the Constitution.[14/]

The nature of the problem is not different in form from any case in which

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14/ It is no more desirable to draw a line around state sovereignty -- whether by reference to history or to some abstract conception of sovereignty -- than it is to limit the federal government's power by resort to eighteenth-century conceptions of interstate commerce.

the Court is called upon to resolve conflicts between rights or powers. See, e.g., Nebraska Press Association v. Stuart, 427 U.S. 539, 547, 570 (1976) (balancing fair trial and free press rights). In such cases, the Court is required to determine which of the two rights or powers must prevail in the particular case. Only rarely can this determination be made by reference to a specific constitutional provision. Thus, we believe that Justice Blackmun properly noted that decision in federalism matters involves a balancing process. National League of Cities, 426 U.S. at 856 (Blackmun, J., concurring). While later cases have treated this observation as a caveat, see EEOC v. Wyoming, 103 S. Ct. 1054, 1061 (1983), the states believe

that it is the essential feature of the decisional process.15/

The use of a balancing test does not require that the Court weigh the wisdom or desirability of federal legislation, or that it define precisely the contours of state sovereignty. On the contrary, respect for the legislative process and the need to preserve flexibility in governmental arrangements, preclude second-guessing such determinations. Cf. Hawaii Housing Authority v. Midkiff, 104 S. Ct.

15/ Certain federal actions are, of course, not subjects open to debate. It is settled that congressional action will prevail over state action regulating private conduct. This is the sense of the Court's emphasis that state sovereignty can limit commerce regulation only as it acts against the States qua States. See Hodel, 452 U.S. at 290-91. Similarly, congressional action to protect civil rights pursuant to the Fourteenth Amendment can trump the states' sovereignty. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

at 2331. It follows then that a rational exercise of admitted power by either the state or the federal government ought not to be denigrated.

Analogy to decisions of this Court in free exercise of religion cases is suggestive in this regard. Compare Davis v. Beason, 133 U.S. 333, 342-44 (1890) (Mormon's opinion regarding polygamy is not a religious belief), with Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) ("It is no business of the Court to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."). 16/ For similar reasons,

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16/ Cf. Wisconsin v. Yoder, 406 U.S. 205, 214-19 (1972) (inquiring into sincerity and centrality of asserted belief). Although we do not suggest

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inquiry whether an exercise of state power is "really" an exercise of sovereignty fails to respect state democratic choices. To the extent that any analysis requires a judgment that some state activities are "really not" exercises of state sovereignty, it should be abandoned. Cf. United Transportation Union v. Long Island Rail Road Co., 455 U.S. 678, 685 n. 11 (1982) (suggesting distinction between activities like business enterprises and traditionally gov-

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that the analogy is perfect, cases such as Wisconsin v. Yoder do offer a model for resolving conflicting claims of constitutional dimension. There, of course, the clash was between the clear state power to require education of children and the unequivocal right of the Amish freely to exercise their religion. In that the Free Exercise Clause protects another type of autonomy from federal intrusion, the analogy is not wholly amiss.

ernmental functions). For the same reason, the Court should reject any attempt to define state sovereignty by excluding all functions that might be performed by private business. See Brief of Garcia at 35-43. Such an attempt is antithetical to the respect that democratic decisions are constitutionally due.[17/]

In sum, the proper approach to the question posed in this case is to balance the intensity of the national interest in a particular regulation against the injury which it does to state sovereignty. As discussed below, the factors to be considered in this calculus include

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17/ We do not mean to suggest that the Court should blind itself to improper motivation. State action taken solely to defeat federal regulation need not be accorded weight. Cf. United Transp. Union v. Long Island R.R., 455 U.S. at 689.

the nexus between the federal regulation and the national concerns for which the Commerce Clause was adopted, the strength or immediacy of impact on the state activity to be regulated, and the degree to which the regulation intrudes upon state sovereignty. This approach incorporates the principles of National League of Cities, reflected in the three tests articulated in Hodel, as elements in the balancing process.

C. Factors To Be Employed in the Balancing Process.

In this part, the amici will suggest the factors to be assessed in striking a proper balance between the need to effectuate federal initiatives and the need to preserve the vitality of the states. The most vexing of these is the question whether, and to what extent, congres-

sional action intrudes upon state sovereignty. The confusion concerning this issue can be mitigated by analyzing specific congressional action in light of the functions served by the states in the constitutional scheme.

One factor to be assessed, in cases dealing with the exercise of the commerce power, is the proximity of the federal action to the core concerns of the Commerce Clause -- for instance, the removal of local impediments to the development of an integrated national economy. See Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935). Although judicial review of congressional authority to enact particular legislation under the Commerce Clause is largely a formality, L. Tribe, American Constitutional Law 242, certainly some exercises of the com-

merce power have a clearer and more direct connection with the core purpose of the clause than others.[18/] Where that connection is sufficiently direct, and regulation of the states as states is an integral part of the federal plan, state submission to such necessary regulation may be justified. E.g., Fry v. United States, supra.

Similarly, the impact of the state activity on interstate commerce must be assessed to determine whether the state must submit to federal regulation. This factor does not focus on whether the state is engaged in commercial activity, but instead inquires into the degree to

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18/ Compare Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (global navigation regulation) with Wickard v. Filburn, 317 U.S. 111 (1942) (local agricultural production).

which that activity affects the core concerns of the Commerce Clause. Thus, in the context of this case, the question is not whether the regulation of wages and hours of transit workers is within the scope of Art. I, § 8, cl. 3. The amici recognize that it is. National League of Cities, 426 U.S. at 841. Rather the relevant inquiry is an assessment of degree: How much of a burden on interstate commerce is created by exempting publicly employed transit workers from the FLSA? To what extent, if any, will such an exemption lead to economic Balkanization? If the answers to these questions suggest that honoring state prerogatives will come at great cost to the unity and vitality of the national economy, then the national government's interest may prevail. Conversely, if

the public employment of workers to operate a metropolitan mass transit system is only remotely related to interstate commerce, then the interests of the states may predominate.19/

Once the strength of the federal interest and the impact of the state activity have been ascertained, they may be balanced against the injury to state sovereignty posed by the federal regulation at issue. The opinions of this Court and commentaries upon them indicate that this last factor is the most difficult to assess.

19/ A similar assessment of the degree rather than the fact of conflict between national and local interests is a firmly established approach in cases involving state regulatory action claimed to violate the Commerce Clause. See, e.g., Raymond Motor Transportation, Inc. v. Rice, 397 U.S. 137, 142 (1970).

In Hodel, the Court identified two tests seemingly designed to assess the injury done to state sovereignty by congressional action. The first of these, that "the federal regulation must address matters that are indisputably 'attributes of the state sovereignty,'" Hodel, ___ U.S. at ___, has not proved significant in subsequent decisions.[20/] The second of the two tests which may be said to focus on injury is whether "the states' compliance with federal law would directly impair their ability to structure integral operations in areas of

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20/ However, in EEOC v. Wyoming, 103 S.Ct. at 1061 n. 11, the Court sought to give this test some content by suggesting a distinction between activities that are characteristic of a sovereign and activities which may be engaged in by a sovereign and a private body alike.

traditional functions." Hodel, 452 U.S. at 288.[21]

We believe that the "indisputable attributes" and "traditional functions" tests have not proven fully satisfactory because they may have been made to stand in place of a balancing approach, and consequently tend to restrict unduly the concept of state sovereignty. This latter problem would be exacerbated were the Secretary's "essentially, if not exclusively, historical" approach adopted. An essentially historical approach may be simple to apply, but to define the

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21/ The Court has twice resorted to this test to decide challenges to federal law. See EEOC v. Wyoming, 103 S.Ct. at 1062; Long Island R.R., 455 U.S. at 685. This test appears to have two elements, one directed to the bona fides of the affected state function, the other to the degree of harm to that or other functions.

role of the states by what they did in horse and buggy days is unfaithful to any conception of federalism as a dynamic system. Just such an historical reference was rightly rejected by this Court in the 1930's when urged as a limitation on the reach of the Commerce Clause. See, e.g., National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

In sum, the states believe that the injury done to them by federal action ought not to be assessed by reference either to an a priori or to an historical conception of state sovereignty or state sovereign functions. What this Court said in Long Island R.R. fortifies this view. There, the Court cautioned that "emphasis on traditional governmental functions and traditional aspects of

state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 455 U.S. at 686.

As we have argued, the Framers envisioned that the states would function as an effective "counterpoise" to the national government. Yet the states cannot serve this function unless they remain strong and independent. And, as the Framers understood, the strength of the states depends entirely upon their capacity to elicit the attachment of their citizens;[22/] no decree by Congress or a court can preserve a state that has lost this capacity.

22/ See, e.g., The Federalist No. 17 (A. Hamilton), No. 45 (J. Madison). See also Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81, 100-01 (1981).

The ability of the states to fulfill their role in the constitutional scheme is dependent solely upon their effectiveness as instruments of self-government. Thus understood, the role of the states in the constitutional scheme implies both that the states will remain autonomous instruments through which the polity may express its choices, and that there will remain an area within which those choices will be effective.[23/]

23/ The Framers recognized that the vitality of the states depends upon their ability to engage in effective action, and argued that a vast field for such action was reserved to the states in the Constitution:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to

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It is extremely important to recognize that the functions of the states in the constitutional scheme depend not at all upon an assumption that local control of local matters will yield better substantive policies or that it will enable more efficient provision of services or benefits. These are not transcendent concerns of our Constitution. Rather, the Constitution is concerned with establishing a frame of government within which democratic choice is guaranteed. For this reason, injury to state sover-

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> the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. The Federalist No. 45 at 292-93 (J. Madison); see also No. 46 at 294-95 (J. Madison).

eignty should not be assessed in terms of the importance or substantive merit of a particular state policy, but rather in terms of the effect upon self-government. For example, while federal taxation or relocation of a state capitol building might not measurably disrupt state activities, the message to the people -- that their government exists only at the sufferance of Congress -- would constitute an enormous injury.[24/]

24/ See Coyle v. Smith, 221 U.S. 559 (1911); New York v. United States, 326 U.S. 572, 582 (1946). In EEOC v. Wyoming, 103 S.Ct. at 1061 n. 11, the Court suggested that whether state employment decisions constitute exercises of an undoubted attribute of sovereignty may depend upon whether they are vehicles for executing some sovereign choice. The amici agree that displacement of democratic choice is a relevant consideration, but respectfully submit that, regardless of merit, decisions regarding public employment are necessarily decisions concerning the organization and

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Similarly, federal prescription of rights of state employees, or of rules or standards for the performance of local functions, such as fire prevention, police protection, sanitation, and public health, however justified or rationalized, fails to respect the role of the states as instruments of self-government. The merit of such regulation cannot mitigate the injury to democratic values; self-government implies freedom to make wrong choices, or to make no choices at all. If the federal government can regulate these matters, it can do so not because they are not matters pertaining to state sovereignty, but because, despite

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operation of state government. Displacement of those decisions teaches the people that the government is not wholly theirs.

the injury to that sovereignty, some intrusion is justified by overriding national concerns.[25/]

The tests articulated in Hodel can provide assistance in striking the balance between the federal regulatory interest and the injury to the state as an instrument of self-government. For instance, while the "indisputable attributes" test poses analytical difficulties, see EEOC v. Wyoming, 103 S.Ct. at 1061 n. 11, we believe that this test may be understood as a reminder that the

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25/ At the heart of state sovereignty, of course, are the political processes of government through which the polity expresses its will. The amici believe that federal commerce regulation intruding upon state legislative processes is simply not justifiable. The injury to the principle of self-government in such cases is too palpable and other less intrusive means of effectuating federal policy are too readily available to admit of such intrusions.

states are part of a federal system, and that many attributes of a sovereign nation do not inhere in them because of the equal rights of other states, because of the interests of the nation as a whole, or because the Constitution specifically withholds some power from the states, or delegates it exclusively to Congress. Similarly with regard to the "traditional functions" test, the amici states believe that the history of state responsibility for providing a service, together with other considerations, refers to the seriousness of an intrusion on state sovereignty, just as the history of federal regulation may assist in judging the weight of the federal interest.

On balance, however, we believe that a more significant factor is the extent to which the function in question has

been subjected to the state's political decisionmaking process, as evidenced, for instance, by funding through local taxes. This factor is a more reliable proxy than history for the underlying question: whether federal regulation intrudes upon a sovereign function. Moreover, it reflects what we have submitted is the relevant conception of state sovereignty for purposes of these cases -- that the states are instruments of self-government, and immune as such to federal impairment or subversion.

D. The Balance Tips Against Extension of the FLSA to Public Mass Transit.

As our discussion demonstrates, the decision in this case turns on whether the federal interest in extension of the FLSA to public mass transit systems out-

weighs the injury done to state sovereignty. Relying upon a rigid and myopic historical approach, the Secretary argues that because the states generally had not engaged in mass transit prior to federal intervention in the field, that activity is not a "traditional governmental function." But in view of the fact that the states, as well as Congress, have concluded that mass transit is a critical obligation of local government in default of a viable private system,[26/] the singular focus on the tim-

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26/ The Urban Mass Transportation Act represents a congressional acknowledgment that mass transportation is an essential service which is appropriately provided by state or local government. It scarcely becomes the Secretary now to imply that the states, which responded to these findings and to the will of their own citizens, are not in fact engaged in performing a governmental function because federal assistance enabled assumption of

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ing of some state involvement provides an insufficient measure of the federal

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that function. Nor can the Secretary suggest that the FLSA be regarded as a post hoc condition on federal assistance under UMTA. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

Moreover, given the reality that federal taxing and spending policy has made the federal government a substantial partner in every state government, it cannot be assumed that state accession to federal conditions reflects a free choice. Cf. Employees v. Missouri Pub. Health Dept., 411 U.S. 279, 296 (1973) (Marshall, J., concurring). In any event, the distribution of federal tax money does not purchase absolution from the constitutional duty to respect state sovereignty. Cf. Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) (in distribution of unemployment benefits, state may not burden free exercise rights except to further a compelling interest). The Secretary's intimation that services provided with federal assistance should not be treated as true governmental activities, makes federal assistance into a poison, fatal to any state that swallows it. If we have correctly understood it, the Secretary's argument should be firmly rejected.

impact on the states' sovereignty. Indeed, the Secretary's approach arbitrarily fixes the scope of each state's autonomy by reference to the functions performed by all states. Yet the states are not fungible. It makes no sense to determine whether the provision of mass transit is a sovereign function by reference to states with little need for mass transit or for governmental assumption of such services.

In metropolitan Boston, for instance, mass transit has been provided by a public authority or quasi-public agency since 1918. See Helvering v. Powers, 293 U.S. 214, 220 (1934). The cost of operations and debt service, which substantially exceeds revenues, is paid by the Commonwealth and the municipalities within the service area. See Mass. Gen. Laws ch. 161A, §§ 8-13. When local ob-

jection to increasing expenditures threatened to close the system in 1980, the Governor proclaimed a public emergency and a shutdown was averted by additional state appropriations. See Massachusetts Bay Transp. Auth. Advisory Bd. v. Massachusetts Bay Transp. Auth., 382 Mass. 569, 417 N.E.2d 7 (1981). Finding that rising costs were attributable, in part, to inflationary labor agreements, the Legislature enacted statutes establishing "inherent management rights" which cannot be subject to collective bargaining or arbitration. See Mass. Gen. Laws ch. 161A, §§ 19, 19E; Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982). We cite this experience not to demonstrate that mass transit is a "traditional governmental function," but to

show that reliance on the history of a simpler time, or the experience in a majority of states, cannot properly define the central functions of the states as they assume new functions in response to changing demographic and economic reality.27/

Far more relevant indications of state sovereign functions beyond the reach of Congress are, on the one hand, the degree to which mass transit relates to local rather than national concerns

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27/ Uniformity of federal regulatory action is not threatened with this analysis, because uniformity, where essential to the effectuation of the national objective, is itself an interest which the Court can assess in the balancing process. Similarly unfounded is the Secretary's fear of "creeping unconstitutionality" (Supp. Brief at 28) from shifting patterns of state activity which might implicate otherwise valid legislation, since the history and priority of federal regulation are both factors relevant to the weighting of interests.

and, on the other hand, the extent to which the function has been subjected to the local political decision-making process. As with public safety, health, education, and recreation, National League of Cities, 426 U.S. at 851, the assured provision of public transportation is an essential feature of the daily lives of many people -- commuters, school children, and the elderly. No doubt public mass transit affects the national commerce, but the weight of its practical impact is felt locally, in its effect on the immediate, parochial needs of the population served, and in its connection to other peculiarly local government matters such as traffic management, land use planning, and public works. Unlike matters of commerce requiring continued national attention, cf. United Transportation Union v. Long Island R.R., 455

U.S. at 687 (common carriage by rail long subject to comprehensive federal regulation), local public transportation has never been the subject of a federal regulatory system. See Local Division 589, 666 F.2d at 633. Thus, citizen complaints, and perhaps praise, for the fares, the service, or the schedules of public mass transit systems are heard at the local level, not in Washington.

Nevertheless, with the interposition of the FLSA, certain complaints will be voiced at the national level -- those of the employees, who already participate in structuring mass transit operations through the local political process and collective bargaining. Superimposing a layer of federal regulation upon these processes further removes basic employment issues from the control of the local polity which is responsible for and de-

pendent upon the transit system. Unlike the private sector, to which the FLSA is generally directed, employment decisions in the public sector are essentially political matters. The intrusion of the national government in this local political process not only limits the range of choice but, more destructively, demonstrates to the state citizens that the government is not theirs. Thus, in the balance of federal and state concerns in public mass transit systems, the scale tips toward the protection of state choices free from federal interference.

CONCLUSION

For the foregoing reasons, the amici states respond to the Court's question in the negative. While the Court may certainly reconsider and improve the

analytical tools to be employed in cases implicating state autonomy, we believe that the principles of National League of Cities -- principles which permeate our Constitution -- should be reaffirmed. The resolution of this case should leave no doubt that the Court is prepared to protect the existence and foster the vitality of the states so that they may play the critical role reserved for them by the Constitution.

Respectfully submitted,

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